In the United States
Circuit Court of Appeals
for the Ninth Circuit

JAMES R. RYAN, PETER BAZINET and WILLIAM MILLER, Petitioning Creditors, *Appellants.* vs. HERMAN MURPHY, *Appellee.* In the Matter of HERMAN MURPHY, Bankrupt.	No. 2632

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the Northern District of California, First Division

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DANIEL O'CONNELL,
Solicitor for Appellants.

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STATEMENT OF THE CASE

Herman Murphy was insolvent at the date of the alleged commission of an act of bankruptcy by him, March 24, 1913, and was also insolvent at the date of the filing of this involuntary petition in bankruptcy July 21, 1913 (Trans. page 49), at which date the number of his creditors was less than twelve (Trans. page 45) but the amount of his debts was more than $4,000.00.

The petitioners, James R. Ryan and Peter Bazinet, as Ryan and Bazinet, ever since June 2,

1910, were judgment creditors of said Herman Murphy, the amount of their unpaid judgment at the date of filing said involuntary petition being $644.56. (Trans. pages 3, 41, 45, 49.)

William Miller, also a judgment creditor of said Herman Murphy for about $4,000, and M. M. Corrigan, another judgment creditor, joined in said petition.

The act of bankruptcy charged was, the permitting of the sale of certain real estate of the bankrupt on March 24, 1913, at sheriff's sale on the execution issued on the said judgment in favor of said Miller and by virtue of an attachment of the said property made July 1, 1908, the date that action was commenced. (Trans. pages 41, 42, 46.)

The petition alleged that the property at the date of said sale, March 24, 1913, was owned by the bankrupt and had been owned by him continuously from long prior to July 19, 1906, and that on June 22, 1908, nine days before said attachment, said Herman Murphy caused to be recorded in the office of the County Recorder a pretended deed, pretending to convey said property to his wife, which deed purported to be dated July 19, 1906; and that on July 5, 1910, there was recorded in the office of the same County Recorder a pretended deed of the same real estate to Progressive Investment Corporation, a corporation composed only of the wife, daughter and stenographer of said Herman Murphy, as the only incorporators, officers, or directors, or trustees, Ella M. Murphy being its president, which corporation ceased to exist November 30, 1910, by proclama-

tion of the Governor of the State of California, for non-payment of taxes. It further alleged that both said deeds were only pretended deeds, for which no consideration was ever paid, that on July 19, 1906, and ever since Herman Murphy was, and has continued to be, insolvent, and said deeds were so made and recorded in contemplation and knowledge of said insolvency, and for the purpose of hindering, delaying, cheating and defrauding the past, present and future creditors of said Herman Murphy, and that on July 19, 1906, and ever since, said Ryan and Bazinet and Miller were and are creditors of said Herman Murphy, and that Ella M. Murphy, and Progressive Investment Corporation, and its incorporators and officers knew all these facts, and participated in said intent and purpose and that said deeds were void and never conveyed anything, and during all the times said Herman Murphy remained, and continued to be, and is now, the real owner of said real estate, both at law and in equity. (Trans. pages 41, 42, 43, 44.)

2. To this petition Herman Murphy demurred on the ground "that said petition does not state facts sufficient to constitute a cause of bankruptcy against said respondent," and the District Court heard the demurrer, made an order "demurrer overruled," ordered respondent to answer (Trans. pages 44, 45), and after answer referred it to the referee "to ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein." (Trans. page 11.) No appeal was ever taken from these decisions.

3. At the hearings before the referee evidence was offered and admitted tending to prove, and proving, all the allegations in the petition, and especially that the bankrupt has always been in full possession and control of said property, and that "said deed was never delivered to said Ella M. Murphy, but that it has always been, and is now, in the possession of said Herman Murphy, who caused it to be recorded, and has had it in his possession before and ever since it was recorded." (Trans. page 23.) Ella M. Murphy testified before the referee as a witness subpoenaed by the petitioners.

The referee against petitioners' objection and subject to their exception admitted evidence that William Miller alone commenced an action in the Superior Court of the State of California, in and for the County of Alameda, against said Herman Murphy, Ella M. Murphy, and Progressive Investment Corporation, March 28, 1912, to cancel, set aside and vacate those recorded conveyances. At the time of the hearings before the referee said action was pending on a settled bill of exceptions, unheard motion for new trial, and duly filed notice of appeal. Neither of the petitioners, Ryan and Bazinet or Corrigan, were at any time parties to that action. (Trans. pages 4, 19, 53.) In said action Ella M. Murphy and Progressive Investment Corporation filed answers denying generally and specifically the allegations in the complaint. (Trans. page 53.)

4. Thereupon the referee refused to make or report on the said issues, or the said evidence "for the following reasons: First, that the deter-

mination of such issues in petitioners' favor would not establish the ultimate fact to be proven—namely, that William Miller will receive a preference by virtue of his purchase at the execution sale, such determination not being binding on the transferees who claim the property. Second, that the State Court having first acquired jurisdiction over the issues concerning the title to said property, it should, in my opinion, retain the same," and concluded his report as follows:

"My conclusion is that the petition herein either should be dismissed, or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the State Court can be determined." (Trans. pages 7, 8,)

5. Exceptions were duly taken to the referee's report and heard by the District Court, which affirmed the report of the referee, denied the petition for adjudication and dismissed the proceedings. (Trans. page 27.)

The foregoing is the manner in which were raised the following questions:

1. Are the United States Courts *deprived* of *jurisdiction* in bankruptcy *by a mere claim of ownership* of the bankrupt's prpoerty, sold at sheriff's sale in violation of Section 3-a (1) of the Bankrupt Act, *regardless of whether that claim is groundless, or a mere fraud, or void, or valid?*

2. Can such a *claim* of ownership be *shown by incompetent evidence?*

3. Where the *alleged* claimants have full knowledge of, and are present at, the bankruptcy

proceedings and present no claim whatever to said property, is the fact that the referee in bankruptcy had heard from incompetent evidence that more than a year previous in another Court in another proceeding, acting in concert with the bankrupt by the same attorney, had filed an answer disputing an allegation that the bankrupt was the owner of said property, *a sufficient claim of ownership in the bankruptcy proceedings to deprive the Bankruptcy Courts of jurisdiction?*

4. Have the United States Bankruptcy Courts *jurisdiction to investigate the basis of such claim* to ascertain whether it is merely colorable, or whether there was any delivery of the deed, or any transfer whatever, regardless of motives or purposes, especially where it is alleged and proved that the bankrupt is and has been for years in continuous possession of the property?

5. Must the United States Bankruptcy Courts *dismiss the proceedings brought within four months after the Act of Bankruptcy,* so that if the adverse claims are thereafter *determined against the claimant* and in favor of the bankrupt estate it will be *too late to file a new petition in bankruptcy, as more than four months have passed* since the act of bankruptcy, and *fraud will thus be triumphant, when the intent and purpose of the law was to prevent such triumphs?*

6. Can the United States Bankruptcy Courts *determine the existence or non-existence* of an alleged *jurisdictional fact in order to exercise its own jurisdiction, and not to preclude or conclude any adverse claimant to any title* he may have to any property so that the Court can make the

necessary orders *continuing the proceedings to await the determination of the issues in* another Court?

7. If a referee in bankruptcy refuses to find or report on the issues specifically referred to him, has he any jurisdiction to find or report on any other issues which are not referred to him, especially on issues previously determined by the District Court and from which neither party has ever appealed?

8. Is it not error for the District Court to affirm such a report and act thereon by denying the petition for adjudication in bankruptcy and dismissing the proceedings?

II.

SPECIFICATION OF ERRORS RELIED UPON

The decree is erroneous in the following particulars:

1. It goes too far when it denies the petition for an adjudication and dismisses the proceedings, as the farthest it had jurisdiction to go was to stay the proceedings.

2. It denies the power of the Court to ascertain the existence, or non-existence, of every jurisdictional fact necessary to determine the question of jurisdiction.

3. It denies the power of the Court to investigate the existence, or the basis, of the alleged adverse claim of ownership of the property.

4. It affirms a referee's report which the referee had no jurisdiction to make.

5. It affirms a referee's report which distinctly states that it does not make any finding, or report, on the issues referred to the referee, but makes findings and report and suggestions on matters that had become *res judicata* and final and were not, and could not be, referred to the referee.

6. It affirms a referee's report made only on incompetent evidence.

7. It overrules the second exception to the referee's report (Trans. page 15), as said referee had no jurisdiction to make said report, not being on any of the issues referred to him.

8. It overrules the third exception to the referee's report, as said referee deliberately and wilfully refused to report on the issues referred to him and the report should, therefore, be rejected.

9. It overrules the fourth exception to the referee's report, as said referee knowing that the demurrer to the petition had been overruled and the time for appealing therefrom had expired and no appeal taken and no application made to change the decision overruling said demurrer and had passed beyond the power of the District Court to change it, said referee undertakes in his report to change and reverse said decision on said demurrer and deliberately refuses to pass upon the issues referred to.

10. It overrules the fifth exception to said referee's report, as said referee deliberately admitted the incompetent evidence on which he bases

his report, said evidence being a judgment and proceedings in an action in the State Court from which judgment there was an appeal, and a motion for new trial pending and undetermined, and to which action the petitioners, Corrigan, Ryan and Bazinet, were never parties.

11. It overrules the sixth exception to the referee's report, which shows the matters reported by the referee were not issues raised by the petition and answers and that there was no evidence on which to found the matters so reported.

12. It overrules the seventh exception to the referee's report, which shows the matters he reported on had become immaterial and were previously decided the other way by the District Court.

13. It overrules the eighth exception to the referee's report, which shows that there was no evidence whatever of any adverse claim in these proceedings.

14. It overrules the ninth exception, which shows that it was proved that Herman Murphy never delivered any deeds of this property; that at the date of the deed and ever since he was insolvent; that there was no consideration for the deed; that it was made and recorded by him for the purpose of hindering, delaying and defrauding his creditors, of which Ella M. Murphy and Progressive Investment Corporation had knowledge and participated therein; that Ella M. Murphy conveyed any interest she had to Progressive Investment Corporation June 2, 1910, and there were no further transfers, and the cor-

poration became defunct November 30, 1910, and that Herman Murphy has now, and always had, possession of the property since prior to July 19, 1906, and said corporation *did not, and could not, make any claim* to said property, and yet the referee made no finding on this evidence and refused to make any finding thereon.

15. The petition and the evidence showed that the record title stood in the name of a corporation November 30, 1910, when said corporation ceased to exist, and could not act thereafter, and it did not, and could not, make any adverse claim to said property July 21, 1913, or any other time.

ARGUMENT

I.

The District Court erred in denying the petition for adjudication and dismissing the proceedings (Trans. page 27; Nineteenth Assignment of error page 39) because:

1. The overruling of defendants demurrer August, 1913, and ordering Herman Murphy to answer was a decision that, if the facts alleged in the petition were proved, an adjudication must follow, and as no appeal was taken from that decision, and no application made to set it aside, it was binding on said District Court December 4, 1914. (Trans. page 45; Sixth Assignment page 31.)

U. S. Bank vs. Moss, 6 How. 31;
Clearwater vs. Meredity, 1 Wall;
Alley vs. Nott, 111 U. S. 475.

All points not set forth in the demurrer were waived.

Richards vs. Travelers, 80 Cal. 506;

Rhode Island vs. Massachusetts, 12 Pet. (U. S.) 675;

Dunlap vs. Schofield, 152 U. S. 244.

2. The bankrupt having filed an answer controverting certain facts alleged in the petition, the law provides that "*the judge shall determine,* as soon as may be, *the issues presented by the pleadings.*"

Bankrupt Act, Section 18, Subdivision D. (Trnas. pages 45 to 49.)

The judge could not proceed any further until he *determined "the issues presented* by the pleadings," and *he never made such determination.*

3. The *referee's report does not supply the defect,* because said report states that "I am *making no finding upon such issues.*" (Trans. page 7; first and third exceptions pages 11 to 17; fourth assignment of error page 30.)

4. The *affirming* of the referee's report (Trans. page 27) does not supply any defects or even assist, because:

a) The referee had no jurisdiction to report, or even hear, or determine, any issue not raised by the answer to the creditors, as that was all that was referred to him. (Trans. pages 3, 11, 15, 29, 49.)

Branger vs. Chevalier, 9 Cal. 353;

Solomon vs. Maguire, 29 Cal. 227;

Litz vs. Linthicum, 8 Pet. 165;

Alexandria vs. Swan, 5 How 83;

Oteri vs. Scalzo, 145 U. S. 578.

(b) The decision of the District Court overruling the demurrer and thus deciding that the petition could be maintained was binding on the referee.

Sherman vs. Jenkins, 70 Hun. (N. Y.) 593; 24 N. Y. Suppl. 186;

Parcher vs. Dubvar, 118 Wis. 401; 95 N. W. 370;

Minnesota vs. Tuteur, 127 Wis. 382; 105 N. W. 1067.

(c) The report of the referee was bad, not good for any purpose, and the Court should have sent it back to the referee with orders to obey the reference, or the Court should itself have proceeded to "determine the issues raised by the pleadings." (Fifth Assignment, pages 30, 31.)

York vs. Myers, 18 How. 246.

II.

None, or all ,of the reasons given in the opinion for the decree of the District Court are sufficient or valid (Trans. page 27) because:

1. It was of no consequence what point the argument on the demurrer was directed to, as *the matter is to be decided by the record alone* and the record of the demurrer itself and that it was overruled and defendant ordered to answer in five days (Trans. page 45) had the same binding, legal effect on Court and referee, no matter what the argument that produced it, and could not be changed or ignored on hearing exceptions to the referee's report, or at any other time.

2. If authorities were requested for the proposition that a fraudulent transfer is *void and conveys nothing,* we could furnish them, and, therefore when property of a bankrupt is attached and the lawsuit is fought for seven years and the property then sold at sheriff's sale and the bankrupt permits it to be sold, while insolvent, he commits an act of bankruptcy, *notwithstanding the void transfer.* There was no transfer, it was a mere sham.

3. Even though it were necessary to have the sale "determined to be fraudulent in an action to which the transferee is a party," *that would be no ground for "denying the petition for adjudication and dismissing the proceedings,"* although it might be for *staying proceedings;* as the petition must be filed *within four months after the sale,* and if dismissed and later the sale is determined fraudulent and, *therefore, a plain act of bankruptcy, then the Bankruptcy Court had lost jurisdiction to entertain a creditor's petition.*

But for the *purpose of adjudication it is not necessary to have even a stay of proceedings,* as is hereinafter more fully shown.

4. No petitioning creditor "*complains* that he himself has *received* a preference under such proceedings." The *receipt* of a preference is not an *act of bankruptcy.* The complaint is that *an act of bankruptcy was committed by permitting the property to be sold under legal process.* IT IS ABSOLUTELY IMMATERIAL WHO BOUGHT IT. Anyone is permitted to buy it.

5. Ryan and Bazinet are petitioners, having a judgment of more than $600 and the number

of creditors being less than twelve, they did not purchase any property, and could maintain these proceedings alone; therefore, *it is immaterial what any other petitioner did or did not do.*

6. The law favors the collection of debts.

The bankruptcy act is *remedial,* and there is nothing in *law,* or *morals,* or *reason,* or *common sense,* or *justice,* to deter a creditor from presenting to the Court the fact *that a fraudulent debtor has committed acts of bankruptcy,* even though the complaining creditor purchased the property at public auction.

7. But the *injustice of this erroneous reason appears* greater when we reflect that *the property would be lost to the bankrupt estate if a petitioner did not buy it, as the very fact that he joins in the petition is an offer to deliver the property to the bankrupt estate, and avoids any preference.* Other fraudulently concealed property will be distributed to the creditor by the bankruptcy proceedings and justice done.

III.

There was no adverse claim, or any claim, to this property filed or presented in these proceedings, although Ella M. Murphy, president of the defunct corporation, testified as witness on subpoena of petitioners. (Trans. pages 9, 18, 19, 30.)

IV.

Ella M. Murphy having conveyed to the corporation any interest she had on June 2, 1910, had no claim, and Progressive Investment Cor-

poration having ceased to exist November 30, 1910, *could not make any claim in 1913.*

V.

The admission of the record and files in the action of William Miller vs. Herman Murphy, Ella M. Murphy, Progressive Investment Corporation, et al, commenced March, 1912, in the Superior Court, in Alameda County, for the purpose of setting aside these fraudulent conveyances, in which action it was alleged to be the property of Herman Murphy, which allegation was generally and specifically denied by Ella M. Murphy and Progressive Investment Corporation and from the judgment there was an appeal pending and a motion for new trial undetermined and granted while these proceedings were pending (Trans. page 19), was erroneous, because:

1. The pendency of the appeal made it incompetent evidence, even betwen the parties.

Di Nola vs. Allison, 143 Cal. 106; 65 L. R. A. 419.

2. Ryan and Bazinet not being parties to that action, it was inadmissable as to them.

3. It was no evidence that a claim existed in 1913.

4. The evidence was offered by Herman Murphy, and not by any alleged claimant. (Trans. pages 18, 22, 39.)

IV.

The Court could examine into the question of whether the alleged deeds were void or valid with-

out rendering a decision binding on any adverse claimant, because:

1. Every court of equity has power to determine the existence or non-existence of any fact necessary for the exercise of its own jurisdiction.

Morton vs. Broderick, 118 Cal. 481;

Byrne vs. Drain, 127 Cal. 668;

Mueller vs. Nugent, 184 U. S. 1.

2. The proceedings being in rem to determine the status of the bankrupt, the Court could proceed without having any other parties before it.

3. If Herman Murphy defaulted, the Court could have made an order of adjudication.

4. Bankruptcy Court can not delegate any of their own powers or duties to any other Court.

U. S. F. & G. Co. vs. Bray, 202 U. S. 207.

5. Where the conveyances are voluntary, while grantor is insolvent, the grantee does not have to have notice or knowledge and is not a necessary party, and fraudulent grantors are not necessary parties.

6. A transfer may be an act of bankruptcy, although the trustee may not be able to avoid the preference.

In re Drummond No. 4093, Fed. Cas. S. C., 1 N. B. R. 231; Sect. 60 of Bankrupt Act.

7. It appeared from petition, and evidence plainly shows, that these deeds were never delivered; that they were voluntary, without any consideration; that Herman Murphy was insolvent before and at the time and ever since the date they were made and recorded; and the alleged grantees knew it, and also knew they were

made and recorded for the purpose of hindering, delaying, and defrauding the creditors of Herman Murphy, and they participated in that intent and purpose and, therefore, said deeds were void and the property remained Herman Murphy's on March 24, 1913, when sold by the sheriff.

Judson vs. Lyford, 84 Cal. 505;
Scholle vs. Finnell, 166 Cal. 553.

Wherefore, appellants pray that the decree of the District Court be reversed, and directed to determine the issues of fact raised by the pleadings.

Respectfully submitted,

DANIEL O'CONNELL,
Solicitor for Appellants.